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FILED

APR 3 - 1997

Ed Smith
CLERK OF SUPREME COURT
STATE OF MONTANA

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF MONTANA

DAVID E. FIFE,

Petitioner, Appellant,

vs.

FIRST JUDICIAL DISTRICT COURT,
HONORABLE DOROTHY
MCCARTER PRESIDING,

Respondent.

Cause No.:

APPLICATION FOR WRIT OF
MANDAMUS, OR OTHER
APPROPRIATE WRIT

STATEMENT OF THE CASE

In Lewis and Clark County, Cause ADV - 96-640, Honorable Dorothy McCarter issued two separate rulings dated September 5, 1996, and January 27, 1997. The first dismissed Fife's various claims and Martin's motions for sanctions. The second granted Martin's request for Judicial Review and sent the child support matter back to CSED for rehearing. Both orders are attached. Judge McCarter specifically **refused** to certify the first order for purposes of appeal after Fife so moved (See Order dated November 18, 1996). Fife moved for entry of **final** judgment **after** the second order and Judge McCarter again specifically refused (See Order dated February 12, 1997). Reading these orders makes it clear that there are no issues remaining before the district court. Fife now moves the court to issue a writ of mandamus requiring the district court to enter a **final** order or judgment which is appealable under **Rule 1 M. R App. P.**

APPLICATION FOR WRIT OF MANDAMUS, OR OTHER APPROPRIATE WRIT

Page I

1 or issue such other relief as may be appropriate under the circumstance.

3 LAW

4 **Rule 17 of M. R App. P.** allows the court to accept original writs. Applications must be
5 served on Honorable Judge **McCarter** and should contain exhibits sufficient to rule on the
6 application. The application must be considered at the next court conference and shall be ruled
7 upon as promptly as possible. The Court may require oral argument or grant whatever relief is
8 deemed appropriate. If oral argument is requested, briefs may be required to be filed. A writ of
9 mandamus may be issued in any case where there is not a plain speedy and adequate remedy in the
10 ordinary course of the law to compel a lower court to perform an act as a duty of their office.
11 See **§27-26-102 MCA**. It must be supported by an **affidavit, which** Applicant has placed at the
12 end of this application, The writ must follow certain form and content rules.

13
14 **§27-26-203. Form and content of writ.** The writ may be either
15 alternative or peremptory. The alternative writ must state generally the
16 allegation against the party to who it is directed and command **such** party,
17 immediately after the receipt of the writ or at some other specified time, to
18 do the act required to be performed or to show cause before the court, at a
specified time and place, why he has not done so. The peremptory writ
must be in a similar form, except that the words requiring the party to show
cause why he has not done as commanded must be omitted and a return
day inserted.

19 The writ must be served personally or acknowledged like a summons, unless specifically
20 allowed otherwise. There are additional procedures that are applicable depending on the facts.
21 Ultimately, judgment may be issued allowing damages and costs, and mandates may be issued
22 without delay.
23

24 ARGUMENT

25 Our Constitution requires that justice be administered speedily and “without delay” (**Rule**
26 **1 M. R App. P. Section 17 of the Declaration of Rights of the Montana Constitution**).
27 The rights of due process include the right to appeal adverse judgments. By **refusing** to enter a
28

1 final judgment, the lower court has violated that right, The lower court has not identified any
2 reason why a final judgment has not been issued or cannot be issued. It has directed a retrial at
3 CSED while placing Fife's right to appeal the adverse rulings in semi-permanent hiatus.

4 Should a final judgment issue, Fife could appeal. The appeal would not necessarily stay
5 execution of the judgment or re-hearing. See **Rule 62 M. R Civ. P.** which indicates how a stay
6 might be issued

7 **Rule 58 M. R Civ. P.** requires the judge to "promptly settle the form of judgment and
8 direct its entry." Here, if Fife is correct in his objections to the district court's orders, his right to
9 appeal, if successful, would preclude another CSED hearing and would entitle him to his day in
10 court. The entry of a judgment also sets the clock in motion for the appeal rights to lapse if not
11 exercised.

12 CONCLUSION

13 This court should direct the lower court to do one of three things: issue a final judgment,
14 certify the two orders for purposes of appeal, or show cause why either of the above actions
15 should not be done.

16
17 DATED this 11 day of March, 1997.

18 ~~SKELTON & COOLEY~~
19 by Paul Neal Cooley

20 CERTIFICATE OF MAILING

21 The undersigned hereby certifies that on the 11 day of March, 1997, the
22 foregoing document was served on the parties hereto by mailing a true and correct copy thereof,
23 postage prepaid, to the following:

24 Ron Waterman
25 P. O. Box 1715
26 Helena, MT 59624

Peggy Probasco
Department of Public Health & Human
Services
17 West Galena
Butte, Montana 59701

26 David E. Fife
27 7140 Buckham Lane
28 Missoula, MT 59802-5688

Judge McCarter

ccc 9/10
File

NANCY S. HARGREAVES
CLERK OF DISTRICT COURT

SEP 5 2 28 PM '96

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BY TRACI HARGREAVES
CLERK

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MONTANA FIRST JUDICIAL DISTRICT
LEWIS AND CLARK COUNTY

* * * * *

PATRICIA MARTIN,
Petitioner,
vs.

DAVID E. FIFE, and the CHILD
SUPPORT ENFORCEMENT DIVISION OF
THE STATE OF MONTANA,
Respondent.

* * * * *

DAVID E. FIFE,
Petitioner/Plaintiff,
vs.

PATRICIA MARTIN and
THE STATE OF MONTANA,
Respondent/Defendant.

* * * * *

Presently before the Court are several motions filed in
the above-consolidated cases. The motions were briefed. Oral

Cause No. **ADV 96-134**

ORDER RE MOTIONS

1 argument "as held July 12, 1996, at which time Patricia Martin
2 was represented by Ronald F. Waterman, David E. Fife was
3 represented by Paul Neal Cooley, and the Department of Public
4 Health and Human Services was represented by John **McRae**. The
5 motions are submitted for decision.

6 **BACKGROUND**

7 These consolidated cases consist of Patricia Martin's
8 petition for judicial review of an order of the Child Support
9 Enforcement Division of the State of Montana, and David Fife's
10 petition/complaint against Patricia Martin and the State of
11 Montana. Both actions stem from the birth of Benjamin Martin on
12 September 10, 1981. Patricia Martin (Martin), Benjamin's natural
13 mother, applied for welfare benefits in 1991 and named David Fife
14 on her application as the child's father. The Child Support
15 Enforcement Division (CSED) pursued paternity proceedings to
16 establish Fife's paternity, and ordered blood tests. Fife
17 appealed the order for the blood tests, but the appeal was
18 dismissed for failure to include CSED as a party in interest and
19 to serve notice to that agency and to the attorney general. The
20 District Court's order of dismissal was affirmed on appeal. *Fife*
21 *v. Martin*, 261 Mont. 471, 863 P.2d 403 (1993), overruled on other
22 grounds, *Hilands Golf Club v. Ashmore*, ____ Mont. ____, ____ P.2d
23 ____, 53 St. Rep. 664 (1996). Fife then filed a declaratory
24 judgment action in Missoula, seeking to have his constitutional
25 rights with respect to the blood tests determined. The district

1 court dismissed the case on the basis of collateral estoppel.
2 The order of dismissal was affirmed on appeal. *Fife v. State of*
3 *Montana, Child Support Enforcement Division*, No. 94-405, slip op.
4 (Mont. Feb. 15, 1995). CSED concluded that Fife was the child's
5 natural father and eventually issued a Notice of Financial
6 Responsibility. Patricia Martin has challenged the agency
7 proceedings and order in her petition for judicial review.

8 Fife's petition/complaint contains multiple allegations
9 and causes of action. He first alleges that he has been
10 aggrieved by CSED's determination of paternity, and claims that
11 such determination is barred by the statute of limitations. He
12 also alleges wrongful pregnancy against Martin.

13 By stipulation of the parties, both actions were
14 consolidated.

15 CSED'S MOTION TO DISMISS

16 The Montana Supreme Court has summarized the rules to
17 be applied in deciding a motion to dismiss. A district court
18 rarely grants a motion to dismiss pursuant to Rule 12(b),
19 M.R.Civ.P. *Wheeler v. Moe*, 163 Mont. 154, 161, 515 P.2d 679, 683
20 (1973). In determining whether dismissal is warranted, the
21 allegations of the complaint must be viewed in a light most
22 favorable to plaintiffs, admitting and accepting as true all
23 facts well pleaded. *United States Nat'l Bank of Red Lodge v.*
24 *Montana Dep't of Rev.*, 175 Mont. 205, 207, 573 P.2d 188, 190
25 (1977) (citing *Board of Equalization v. Fanners Union Grain*

1 **Terminal Ass'n**, 140 Mont. 523, 531, 374 P.2d 231, 236 (1962)).

2 A complaint will not be dismissed for failure to state a claim
3 unless it appears beyond any doubt that the plaintiff can prove
4 no set of facts in support of his claim which would entitle him
5 to relief. Thus, the district court is not to engage in **fact-**
6 finding when ruling on a motion to dismiss. **Flemmer v. Ming**, 190
7 Mont. 403, 408, 621 P.2d 1038, 1041 (1981).

8 CSED has moved to dismiss Fife's petition for judicial
9 relief on the ground that he failed to timely serve that agency.

10 On December 29, 1995, CSED issued its financial
11 responsibility decision and order. Fife filed his action in
12 Missoula County on January 25, 1996, seeking judicial review of
13 the CSED order and damages against Martin for wrongful pregnancy.
14 The attorney general was served with a copy of the complaint, but
15 CSED was not served. The pleadings contain no record that CSED
16 was ever served with a copy of the petition/complaint. It is
17 interesting to note that even after the motion to dismiss, all
18 the briefing, and the oral argument, the record *still* fails to
19 show that CSED has been served.

20 Rule 4D(2)(h), M.R.Civ.P., permits service of a
21 complaint to a state agency "by delivering a copy of the summons
22 and complaint to the attorney general *and to any other party*
23 *which may be prescribed by statute.*" (Emphasis added). Section
24 2-4-702(2)(a), MCA, requires that "[c]opies of the petition must
25 be promptly served upon the agency and all parties of record.'

(Emphasis added). Thus, service was required to have been made to CSED. Such service is satisfied if copies of the petition are mailed to the parties. *Hilands Golf Club v. Ashmore*, 53 St.Rep. 664, 667 (1996), overruling *Fife v. Martin*, 261 Mont. 471, 863 P.2d 403 (1993). The petition/complaint was filed January 25, 1996. The first amended petition/complaint was filed February 14, 1996. As previously noted, the record does not reflect any service of either petition, by mail or otherwise, to CSED.

The Court notes that Fife attempted to file a second amended petition/complaint eliminating the State or CSED as a party, but containing the same allegations as in the first amended petition/complaint. However, his petition for judicial review cannot stand without naming CSED as a party and serving that agency pursuant to Section 2-4-702, MCA.

Fife contends that CSED, rather than he, had the responsibility to pursue the appeal of the blood test results in the District Court, and that, therefore, failure to properly serve parties under the judicial review statutes should not preclude the Court's jurisdiction over the issues raised in his petition. Fife asserts that Section 40-5-236, MCA, provides the proper procedure. Title 40, Chapter 5, MCA, authorizes the Department of Public Health and Human Services to determine the paternity of a child for purposes of determining child support obligations. The Department is authorized to order paternity blood tests and to issue an order of nonpaternity or presumption

1 of paternity. The Department may then issue ,a support order on
2 the basis of the presumption of paternity. Section 40-5-234,
3 MCA. An order of nonpaternity, presumption of paternity, or
4 child support may be reviewed by judicial review under the
5 Montana Administrative Procedure Act. Section 40-5-235(4), MCA.

6 In addition, if the alleged father disagrees with
7 either the procedure or the outcome of paternity blood tests, he
8 can submit a written exception to the Department's findings
9 within 20 days after receiving the results, after which the
10 Department is required to institute an action in district court
11 to review the results. Section 40-5-236, MCA. That section
12 pertains only to the determination of paternity, and not to a
13 child support order. The pleadings do not allege that a *written*
14 exception to the blood test results was submitted within 20 days
15 of receiving the results. A motion to dismiss is not the proper
16 avenue to determine whether Fife was afforded that statutory
17 procedure, because such a determination involves consideration of
18 evidence not contained in the pleadings. The pleadings do not
19 reflect any legal proceeding commenced by Fife in mandamus or
20 otherwise to compel the Department to act *in* accordance with that
21 statute. What is of record, however, is Fife's petition for
22 judicial review/complaint for declaratory relief. Fife has
23 chosen to proceed under the Montana Administrative Procedure Act
24 under Section 40-5-235(4), MCA.

25 Fife's petition for judicial review is DISMISSED for

1 failure to properly serve CSED.

2 **MARTIN'S MOTION TO STRIKE**

3 Martin has moved to strike Fife's affirmative defenses
4 and cross-petition for judicial review. She has also moved to
5 strike Fife's petition for judicial review. For the reasons
6 already discussed herein, the motion to strike Fife's petition
7 for judicial review is GRANTED. Pursuant to ***Egeland v. City***
8 ***Council of Cut Bank, 245*** Mont. 484, 803 P.2d 609 1990), the
9 motion to strike the cross-petition and affirmative defenses is
10 GRANTED.

11 **MARTIN'S MOTION TO DISMISS**

12 Martin has moved to dismiss Fife's cause of action for
13 wrongful pregnancy on the ground that no such cause of action is
14 recognized in this state. Martin also contends that such a cause
15 of action is barred by the statute of limitations. Fife has not
16 responded to this issue. The Court agrees that such motion to
17 dismiss should be granted because no such cause of action is
18 recognized in this state.

19 Martin's motion to dismiss is GRANTED.

20 **MOTION FOR SANCTIONS**

21 Martin has moved for sanctions against Fife. Upon
22 considering the matter, the Court at this time rules that the
23 motion is DENIED.

24 **ORDER**

25 Fife's petition for judicial review, his cross-petition

1 for judicial review, his complaint for declaratory relief, and
2 his cause of action for wrongful pregnancy are DISMISSED with
3 prejudice.

4 Martin's motion for sanctions is DENIED.

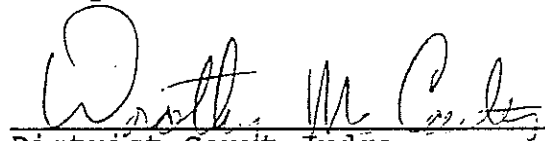
5 The only remaining cause of action is Martin's petition
6 for judicial review.

7 IT IS SO ORDERED.

8 DATED this day 5 of September, 1996.

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District Court Judge

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12

13 pc: Paul Neal Cooley
14 Ronald F. Waterman
John McRae/CSED

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Martin#2.ord

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MONTANA JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

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PATRICIA MARTIN,

Petitioner,

VS.

DAVID E. FIFE, and the CHILD
SUPPORT ENFORCEMENT DIVISION OF
THE STATE OF MONTANA,

Respondent,

* * * * *

DAVID E. FIFE,

Petitioner/Plaintiff,

VS.

PATRICIA MARTIN and
THE STATE OF MONTANA,

Respondent/Defendant.

* * * * *

Petitioner's brief in support of her petition for
judicial review asserts that the matter should be remanded to

Cause No. ADV 96-134

O R D E R

1 the administrative law judge for rehearing on the merits. CSED
2 agrees without conceding to any of Petitioner's arguments or
3 reasoning. David Fife resists such a remand.

4 The Court agrees that a remand would be appropriate.

5 IT IS **THEREFORE** ORDERED that this matter is REMANDED to
6 the Child Enforcement Support Division.

7 IT IS **FURTHER** ORDERED that David Fife make full and
8 accurate disclosure of all relevant financial information needed
9 by CSED and Patricia Martin to **determine** child support.

10 DATED this 27 day of January, 1997.

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District Court Judge

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15 pc: Ronald F. Waterman
16 Paul Weal Cooley
John M. McRae/CSED

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Martin#3.ord

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Nov 18 4 12 PM '96

FILED
BY ALICE DOVE
DEPUTY

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

PATRICIA MARTIN,

Petitioner,

- v -

DAVID E. FIFE, and the CHILD
SUPPORT ENFORCEMENT
DIVISION OF THE STATE OF
MONTANA,

Respondent.

Cause No. ADV- 96-134

ORDER

DAVID E. FIFE,

Petitioner/Plaintiff,

-v-

PATRICIA MARTIN and STATE OF
MONTANA,

Respondent/Defendant.

Cause No. ADV-96-640

On September 5, 1996, this Court issued an order dismissing all
causes of action in the above-entitled cause, with the exception of Martin's petition
for judicial review.

Fife's motion to amend the order is DENIED.

Fife's motion for certification for appeal is DENIED

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Martin's request for a judgment conference is DENIED.

Child Support Enforcement Division's motion for an order vacating deposition and subpoena duces tecum is GRANTED.


The briefing schedule on Martin's petition for judicial review is as follows:

Petitioner's opening brief is due December 16, 1996. Respondents' briefs are due January 15, 1997. Petitioner's reply brief is due January 31, 1997.

Upon receipt of the reply brief, the matter will be deemed submitted for decision unless the Court determines that oral argument is necessary.

IT IS SO ORDERED.

DATED this 18 day of November, 1996.


DISTRICT COURT JUDGE

pc: Ronald F. Waterman
Paul Neal Cooley
John McRae

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NANCY S. HENNEY
CLERK OF DISTRICT COURT

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CLERK

MONTANA FIRST JUDICIAL-DISTRICT COURT
COUNTY OF LEWIS AND CLARK

)

In re the Paternity of BMJ

PATRICIA MARTIN,

Cause No. ADV-96-640

Petitioner/Respondent,

vs.

DAVID E. FIFE, and the CHILD
SUPPORT ENFORCEMENT DIVISION OF
THE STATE OF MONTANA,

**ORDER RE REQUEST
FOR FINAL JUDGMENT**

Respondent/Defendant.
)

)

DAVID FIFE,

Petitioner/Plaintiff,

vs.

PATRICIA MARTIN and
STATE OF MONTANA,

Respondent/Defendant.
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)

Fife has requested a final judgment with respect to
this Court's Order of January 27, 1997.

That Order is not a final judgment. It is an Order to remand the petition for judicial review back to the administrative agency for a hearing on the merits.

Fife's request is therefore DENIED.

DATED this 12 day of February, 1997.

W. J. McCall
District Court Judge

pc: Ronald F. Waterman
Paul Neal Cooley
John McRae/CSED

Martin#4.ord

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